IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.118 OF 2004

Shri.Abdul Mukim Umar Ansari]
Residing at Sunder Kamla]
Nagar, Room No.330,]
Bhau Daji Road, Sion (West)]
Mumbai-400022]..Appellant
[Ori.Accused No.1]

Vs.

The State of Maharashtra]..Respondent

...

Ms.Pooja Bhojne Appointed advocate for the Appellant
Mr.P.S.Hingorani APP for State

...

WITH

CRIMINAL APPEAL NO. 1358 OF 2003

Mohd.Salim @ Pappu Umar]
Ansari, Indian Inhabitant]
Adult, residing at]
Sundar Kamla Nagar,]
Room No.330, Bhau Daji Rd.]
Sion (West) Mumbai-400022]
(At present Lodged in]
Kolhapur Central Prison)]..Appellant
(Ori.Accused No.2)

Vs.

The State of Maharashtra]
At the instance of Sion]
Police Station, (CR No.323]
of 1999)]..Respondent

...

Mr.C.K.Talekar Advocate for Appellant
Mr.P.S.Hingorani APP for State

...

WITH
CRIMINAL APPEAL NO. 1565 OF 2003

1. Mohd. Salim @ Pappu Ummar Ansari, An Adult Resident of Sunder Kamla Nagar, R.No. 330, Bhau Daji Road, Sion (W), Mumbai-400022 ..Deleted as as per Court's order dt.9.2.2004

2. Sanawar Badraf Hasan Ansari, An Adult, resident of Sunder Kamla Nagar, Near Masjid, Bhau Daji Road, Sion (W), Mumbai-22 (Presently lodged at Yervada Central Prison, Pune.) ..Appellants (Ori.Accused Nos. 2 and 3)

VS.

The State of Maharashtra ..Respondent

...

Mr.Amin Solkar Advocate for Appellant No.2
Mr.P.S.Hingorani APP for State

...

CORAM: R.M.S.KHANDEPARKAR, AND SMT.V.K.TAHILRAMANI, JJ.
DATE OF RESERVING JUDGMENT: SEPTEMBER 26, 2007
DATE OF PRONOUNCING JUDGMENT: OCTOBER 15, 2007

ORAL JUDGMENT [PER SMT.V.K.TAHILRAMANI,J.]:

1. The appellants original accused Nos.1 to 3 have preferred these appeals. For the sake of

convenience, the appellants will be referred to as "accused Nos. 1 to 3" as per their status during the trial. Through Appeal No.118 of 2004, the appellant-Abdul Mukim Umar Ansari (original accused No.1), through Appeal No.1358 of 2003, the appellant-Mohd.Salim @ Pappu Umar Ansari (Original Accused No.2) and through Appeal No.1565 of 2003, the appellant Sanawar Badraf Hasan Ansari (Original accused No.3) have challenged the judgment and order dated 22nd July, 2003 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.333 of 2000. By the said judgment and order, the learned Sessions Judge convicted all the three appellants i.e. original accused Nos.1 to 3 for the offence under Section 302 r.w. 34 of IPC and Section 450 r.w. 34 of IPC. For the offence under Section 302 r.w.34 of IPC, all the appellants were sentenced to life imprisonment and to pay a fine of Rs.1000/- in default R.I. for three months. For the offence under Section 450 r.w. 34 of IPC, all the appellants were sentenced to R.I. for two years and fine of Rs.1000/- in default R.I. for three months.

2. The prosecution case briefly stated is as

under:

. That the complainant P.W.1 Koshar Fakruddin Electricwalla was the son of deceased Fakruddin Ibrahim. Fakruddin was having a stove repairing business at Chawl T-6, Shop No.4, Sunder Kamala Nagar, Bhau Daji Road, Sion. The shop of the complainant Koshar was opposite the shop of his father. The complainant was doing business of preparing sticker dye. One Shri.Kake Bhatia who was the owner of adjacent shop, wanted to sell his residential house, hence, he requested Fakruddin (deceased) to search for a customer. Fakruddin was to get some commission if he got a customer for the said house. On 9.12.1999 at about 2.45 p.m. Fakruddin was in his shop and the complainant was in his own shop which is opposite the shop of Fakruddin. One Chunibhai came to the shop of Fakruddin. Fakruddin told Chunibhai that house of Kake Bhatia was to be sold for Rs.5.50 lakhs. At that time, original accused No.1 Abdul Mukim Umar Ansari was passing by. Abdul Mukim Umar Ansari heard the conversation and he immediately shouted that he would get a customer for the said house and Fakruddin should not get a customer for that house.

Accused Abdul Mukim Umar Ansari started threatening and abusing Fakruddin. This was seen by the complainant Koshar. The complainant Koshar came out of his shop and started pacifying both of them. Thereafter accused Abdul Mukim Umar Ansari left the place but while leaving the place, he threatened Fakruddin by saying that "I will see you and I will not leave you".

3. At about 3 p.m. accused no.1 came to the shop of Fakruddin (deceased) along with accused No.2 and accused No.3. All the three accused were known to the complainant Koshar. All the three accused persons entered into the shop of Fakruddin. Accused Nos.2 and 3 caught hold of the arms of Fakruddin. Thereafter, accused No.1 assaulted Fakruddin on the chest by means of a "farshi" (Article No.4) i.e. weapon which looks like a screw-driver. Thereafter, the accused persons ran away. The complainant P.W.1 Koshar took his father Fakruddin to the hospital. Fakruddin was declared dead on arrival. The body of Fakruddin was sent for post mortem. During the post mortem examination, one injury i.e. a single penetrating stab injury with square end on the right fourth

inter costal space 1.2 cm. from the right mid clavicle line, measuring 0.7 cm. x 0.3 cm, Cavity Deep and directed backwards and to the middle was found. The said injury was above the nipple towards right side on the chest. Following internal injuries were noticed:

. i) A penetrating stab wound on the right forth inter poctal muscle 0.7 cm x 0.3 cm. x cavity deep ribs and cartilages intact.

. ii) 0.7 cm. x 0.3 cm. penetrating wound on pericardium with 200 gms. of blood clot.

. iii) Heart 0.7 cm. x 0.3 cm. on the right atrium and causing penetrating injury on the septum."

. The cause of death was haemorrhagic shock due to penetrating injury to the heart. After completion of investigation, charge sheet came to be filed.

4. Charge came to be framed against all the

appellants-original accused Nos.1 to 3 under Sections 450 r.w. 34 and 302 r.w. 34 of IPC. They pleaded not guilty to the said charge and claimed to be tried. Their defence is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellants as stated in paragraph 1 above. Hence, this appeal.

5. We have heard Ms.Pooja Bhojane, Mr.C.K.Talekar and Mr.Amin Solkar, the learned advocates appearing for the respective appellants and the learned APP for the State in all the above three appeals. We have perused the judgment and order and records pertaining to the above matter. After giving our anxious consideration to the matter, we are of the opinion that the appeal of the accused nos.2 and 3 deserves to be partly allowed. As far as conviction and sentence of the accused no.1 is concerned, we may come to that a little later.

6. So far as the presence of accused nos.1 to 3 at the time of the incident is concerned, we are satisfied that it has been established to the hilt

through the credible ocular account rendered by P.W.1 Koshar and P.W.2 Shahanavaz Husain. P.W.1 Koshar has stated that deceased Fakruddin Ibrahim was his father. His father Fakruddin had a stove repairing business at Chawl T-6, Shop No.4, Sunder Kamla Nagar, Bhau Daji Road, Sion. The shop of the complainant Koshar was opposite the shop of his father. The complainant was doing business of preparing sticker dye. One Shri.Kake Bhatia who was the owner of adjacent shop, wanted to sell his residential house, hence, he requested Fakruddin (deceased) to search for a customer. Fakruddin was to get some commission if he got a customer for the said house. On 9.12.1999 at about 2.45 p.m. Fakruddin was in his shop and the complainant was in his own shop which is opposite the shop of deceased. One Chunibhai came to the shop of Fakruddin. Fakruddin told Chunibhai that house of Kake Bhatia was to be sold for Rs.5.50 lakhs. At that time, original accused No.1 Abdul Mukim Umar Ansari was passing by. Abdul Mukim Umar Ansari heard the conversation and he immediately shouted that he would get a customer for the said house and Fakruddin should not get a customer for that house. Accused Abdul Mukim Umar Ansari started threatening

and abusing Fakruddin. This was seen by the complainant Koshar. The complainant Koshar came out of his shop and started pacifying both of them. Thereafter accused Abdul Mukim Umar Ansari left the place but while leaving the place, he threatened Fakruddin by saying that "I will see you and I will not leave you".

7. The evidence of P.W.2 Shahanavaz Husain is on the same lines as that of P.W.1 Koshar. Shahanawaz was working in the shop of the Complainant. Nothing has been brought out in the cross examination of these two witnesses so as to disbelieve their testimony. We find their testimony to be totally reliable.

8. Thus, as far as the presence of the all the accused persons at the spot of the incident and the role played by them is concerned, the same has been established through the evidence of P.W.1 Koshar and P.W.2 Shahanavaz Husain. However, the learned Advocates for the accused Nos.2 and 3 have argued and rightly so that there is no material to show that accused Nos.2 and 3 shared the common intention with accused No.1 to murder Fakruddin.

On behalf of accused Nos.2 and 3, it was submitted that the only role attributed to them is that they held hands of deceased Fakruddin. They did not utter any word nor did they cause any injury to the deceased. It was submitted that in such case, the conviction under Section 302 of IPC deserves to be altered to Section 304-II. In support of their contention, they have placed reliance on the decision in the case of **Kashmira Singh Vs. State of Punjab; reported in AIR 1994 S.C. 1651**. In the case of **Kashmira Singh,** the appellant and the co-accused caught hold of the deceased and one of the co-accused who happened to be there, picked up a knife from his pant pocket and gave a single blow on the deceased on the neck. The single injury proved fatal. The trial Court convicted them under Section 302 of IPC which was upheld by the High Court. However, the Supreme Court set aside the conviction under Section 302 of IPC holding that the common intention with the accused who gave the blow, was not made out on the part of appellant and other co-accused.

9. It is seen that accused Nos.2 and 3 were not present when the earlier incident took place

wherein accused no.1 while leaving the place, gave threats to Fakruddin. Hence, there was no question of them being aware of what had transpired during the earlier incident. Moreover, later when all the three accused came to the spot, accused no.1 was not openly carrying a weapon in his hand but the weapon was taken out by accused no.1 and thereafter he suddenly thrust the said weapon in the chest of Fakruddin. As far as accused nos.2 and 3 are concerned, role attributed to them is that they caught hold of Fakruddin. Immediately thereafter, accused no.1 gave one blow with 'Farshi' on the chest of Fakruddin. There is nothing to indicate that accused nos.2 and 3 knew that accused no.1 was armed with "Farshi" and that he was going to use the same to assault Fakruddin. The assault of "Farshi" by accused no.1 was a sudden one and the evidence on record shows that accused nos.2 and 3 were not aware that accused no.1 would stab Fakruddin. Thus, we find considerable merit in the submission made on behalf of accused nos.2 and 3 that they did not share common intention of accused no.1.

10. Common intention has to be inferred from the

circumstances of a case particularly the part played by the accused and the surrounding circumstances including the nature of weapon used and the injury inflicted as well as meeting of the minds amongst the accused who are being held constructively liable. The evidence on record in this case reveals that it was a sudden act on the part of accused no.1 who suddenly took out weapon like screwdriver and inflicted single injury on the deceased. In such circumstances, it cannot be held that accused nos.2 and 3 had prior knowledge that accused no.1 was armed with weapon like screwdriver and the act of accused no.1 cannot be said to be a conjoint act so as to attract the element of common intention on the part of accused nos.2 and 3.

11. In the present case, even if the prosecution case is to be accepted as a whole, the common intention to commit murder on the part of accused nos.2 and 3 with accused no.1 is not made out. Assault by accused no.1 was a sudden act on the part of accused no.1 who suddenly took out a weapon like screwdriver and inflicted single injury and therefore, common intention cannot be made out.

12. Hence, we are of the opinion that conviction of accused nos.2 and 3 under Section 302 of IPC deserves to be set aside. However, we are of the opinion that the conviction of accused nos.1, 2 and 3 for the offence under Section 450 r.w. 34 of IPC deserves to be confirmed and sentence already undergone by them, would be sufficient for the offence under Section 450 r.w. 34 of IPC.

13. So far as the conviction of accused no.1 for the offence under Section 302 of IPC is concerned, he is the only person who has assaulted the deceased. He has assaulted the deceased by means of "Farshi" which is like a screw-driver and the said assault with the "Farshi" has caused the fatal injury which resulted in the death of Fakruddin. As far as accused no.1 is concerned, Ms.Pooja Bhojane, the learned advocate appointed for the accused no.1, has submitted that accused no.1 did not have any intention of causing death of Fakruddin. She has submitted that the incident had occurred during the course of sudden quarrel. There was no pre-meditation on the part of accused no.1 and only one blow was given by accused no.1 to Fakruddin. The accused did not act in a cruel and

unusual manner. She submitted that in such case, the case would not fall under Section 302 of IPC but would be covered by Section 304-II of IPC. In support of her contention, she has placed reliance on the decision of the Supreme Court in the case of **Pappu Vs. State of M.P. reported in 2006 ALL MR (Cri.) 2360 (S.C.)**. We have perused the decision in the said case. In the said decision, the appellant had given one blow with "lathi" on the deceased. That blow resulted in the death of deceased in the said case. Moreover, it is seen that in that case, the appellant was not armed with weapon prior to the incident and he gave one blow by "lathi" which he picked up from the ground during the sudden quarrel. However, facts in the present case are quite different. In the present case, accused no.1 came to the spot armed with deadly weapon. The weapon used, the part of body on which the weapon was used and the force used in committing the act which is seen from the medical evidence, clearly show that the accused no.1 had intention to cause death.

14. Reliance was also placed on behalf of the accused no.1 on the decision of the Supreme Court

in the case of **Sukhbir Singh Vs. State of Haryana reported in (2002) 3 S.C.C. 327**. In the said case also, the death was caused during sudden fight. It was held that the case would not fall under Section 302 of IPC but it would fall under Section 304-I of IPC. In the said case, it was further observed that "there was no sufficient lapse of time between the quarrel and the fight which means the occurrence was "sudden" within the meaning of Exception 4 of Section 300 of IPC. The time gap between the quarrel and the fight is stated to a few minutes only. However, in the present case, it is seen that after the first incident wherein the accused no.1 threatened Fakruddin by saying that "I will see you and I will not leave you" and he went away, thereafter he went to the police station and lodged a non-cognizable case. Thereafter he came back and thereafter he has assaulted the deceased. The fact that when he came back he was armed with weapon, shows pre-meditation. In the facts of the present case, second incident cannot be said to be a sudden quarrel. In the case of **Sukhbir Singh (supra),** it is so observed that "it has been held by the courts that a fight is not *per se* palliating circumstance and only unpremeditated fight is such.

The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception." In the present case, there was sufficient time for passion to subside. There was sufficient time for the accused to come to normalcy. As there was sufficient time gap, in our opinion, the accused no.1 would not be entitled to the benefit of this exception as the act of accused no.1 would clearly amount to murder.

15. So also reliance was placed by Ms.Pooja Bhojane, the learned Advocate for accused no.1 on the decision in the case of **Narayan s/o Mahadeorao Kolhe Vs. State of Maharashtra reported in 2004 AlL MR (Cri.) 1623.** Ms.Pooja Bhojane, submitted that in the said case, the accused had inflicted only one blow on the head of the victim. The said act took place on account of sudden provocation, hence, it was held that the case would not fall

under Section 300 of IPC but it would fall under Section 304-I of IPC. She submitted that in the said case, there was initial quarrel between the parties and thereafter, the accused rushed to the place where the other accused were quarrelling with the witness and he dealt a blow on the hand with a sword. However, one of the other accused took away the sword, hence, the appellant went home and returned **immediately** carrying a pestle with him and dealt one blow with the pestle on the head of the victim. It was observed that there was no further attack by the appellant on the victim and in such case, the case fell under Section 304-I of IPC. However, as far as the present case is concerned, after the first incident of quarrel took place, the appellant went away after threatening the victim and thereafter he went to the police station and he lodged an N.C. and thereafter he came back to the spot and assaulted Fakruddin with "Farshi". In the case of **Narayan Kolhe (supra)**, the appellant had gone home and returned **immediately** carrying a weapon with him and he dealt a blow with the said weapon. In the present case, it is seen that the accused no.1 has not returned back immediately but he has returned after sometime. There was

sufficient lapse of time between the first quarrel and the second quarrel which shows that occurrence was "not sudden" so as to fall within the meaning of Exception 4 of Section 300 of IPC. Hence, this decision in the case of **Narayan Kolhe** would have no application to the facts of the present case. We find that there is sufficient material on record to show that accused no.1 Abdul Mukim Umar Ansari has committed an offence of murder. From the evidence on record, it is seen that the act of the accused no.1 would clearly fall under Section 302 of IPC. The evidence of P.W.1 Koshar and P.W.2 Shahanawaz clearly shows that accused No.1 had entered into the shop of Fakruddin and thereafter, assaulted him, which assault resulted in the death of Fakruddin. On the basis of the evidence of these witnesses, the prosecution has also proved the charge under Section 450 of IPC not only against accused No.1 but also against accused Nos.2 and 3.

16. Before parting with this judgment, we wish to place on record our appreciation for the way in which Ms.Pooja Bhojane, the learned advocate appointed for the appellant-accused no.1, has conducted the matter. She was meticulously

prepared with the matter and she has very ably conducted the matter. As Ms.Pooja Bhojane has been appointed as amicus curiae for the accused no.1, we quantify her fees at Rs.2000/-.

17. In the result, the conviction and sentence of accused no.1 for the offence under Section 302 and 450 of IPC is confirmed. The accused no.1 who is in jail shall serve out the remaining sentence. The appeal filed by accused No.1-Abdul Mukim Ansari is dismissed.

18. So far as the accused nos.2 and 3 are concerned, they are acquitted of the offence under Section 302 r.w. 34 of IPC. However, their conviction under Section 450 r.w. 34 of IPC is confirmed and sentence of imprisonment is reduced to the period already undergone by them. They be released forthwith if not required in any other case. The appeals preferred by accused nos.2 and 3 are partly allowed.

19. All the three appeals are disposed of in the above terms.

[R.M.S.KHANDEPARKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]